



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Alpine Camping Services

File: B-238625.2

Date: June 22, 1990

Patricia Baker, for the protester.
Allen W. Smith, Department of Agriculture, Forest Service,
for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. General Accounting Office will consider protest concerning award of campground concessionaire special use permits for the operation and maintenance of Forest Service recreation facilities, since the permits are conditioned on the performance of tasks designed to benefit the government and to further the functions of the Forest Service.
2. Agency is not required to issue special use permits for campground concessionaire operations, where such issuance constitutes the exercise of an option as agencies are not required to exercise options under any circumstances.

DECISION

Alpine Camping Services protests the decision by the Forest Service, U.S. Department of Agriculture (USDA), to issue the "San Bernardino National Forest, 1990 Prospectus," (1990 Prospectus), inviting proposals for special use permits for campground concessionaire operations of the Barton Flats and Heart Bar Complexes in California.^{1/} The Forest Service decided to issue the 1990 Prospectus following an agency determination not to extend the existing permit, issued to L&L Inc., under a similar 1989 Prospectus,

^{1/} The Barton Flats Complex consists of five campgrounds and an amphitheater. The Heart Bar Complex consists of two campgrounds.

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beyond the 1989 operating season.^{2/} The protester requests that we direct the Forest Service to issue the permits to Alpine pursuant to the proposals submitted under the 1989 Prospectus, without regard to the proposals submitted under the 1990 Prospectus.^{3/}

We deny the protest.

BACKGROUND

The Forest Service issued a prospectus on March 9, 1989 (1989 Prospectus), inviting offerors to submit separate proposals for two special use permits for campground concessionaire operations for the Barton Flats and Heart Bar Complexes in the San Bernardino National Forest, with each proposal to be separately evaluated. The prospectus contemplated issuing two special use permits for a 1-year initial period, with an option to reissue the permits for an additional 1 or 2 years, not to exceed December 31, 1991. The 1989 Prospectus required offerors to include in their proposals: 1) a detailed explanation of applicable business experience; 2) a financial statement; 3) references; 4) proposed user fees charged to the public for camping services; 5) fees to be paid to the Forest Service; 6) an income and expense worksheet; and 7) an operating proposal. Offerors were required to propose the fees to be paid to the Forest Service, as a percent of total gross receipts from the operation of the campgrounds. The operating plan required offerors to, among other things, provide a contingency plan in the event of an interruption to the campground water supply, and a plan for a reservations system.

Section III of the 1989 Prospectus, "Selection of Concessionaire," set out five evaluation criteria, listed in descending order of importance: 1) financial ability, 2) experience, 3) public service, 4) fees to be paid to the Forest Service, and 5) user fees. The 1989 Prospectus

^{2/} The minimum annual operating season of the complexes in 1989 was from Memorial Day weekend through Labor Day weekend. The minimum annual operating season of the complexes under the 1990 Prospectus is from May 1, to November 1.

^{3/} The Forest Service issued the 1990 Prospectus on February 21, 1990. On May 4, pursuant to 4 C.F.R. § 21.4(b)(2) (1990), the Forest Service informed our Office that it would proceed to issue the special use permits under the 1990 Prospectus.

advised offerors that the fees to be paid to the Forest Service and the user fees charged to the public would be weighed equally in the evaluation, but at less weight than the public service criterion. Award was to be made to the best qualified applicant with demonstrated ability to provide public camping services at a reasonable rate. Six offerors responded to the 1989 Prospectus by the amended closing date of April 17, including L&L and Alpine. The proposals were evaluated and ranked on the basis of total weighted points awarded by an evaluation committee. L&L, received the highest total point score on both of its proposals, while Alpine received the second highest point score on its proposals.^{4/}

By letter dated May 5, 1989, the Forest Service awarded the special use permits to operate the Heart Bar and Barton Flats Complexes to L&L. On May 12, Alpine filed a notice of appeal of the award of the permits with the Forest Service, alleging principally that L&L had received preferential treatment in the evaluation process; that the evaluation was flawed with regard to service to the public and user fees; and that the evaluation committee incorrectly calculated the fees proposed to be returned to the government. On May 24, pointing to the urgency of opening the complexes to the camping public for the upcoming Memorial Day weekend, the Forest Service determined not to suspend L&L's performance under the permits.

Following an extensive administrative appeals process that spanned nearly 8 months, on January 19, 1990, the Forest Service reversed its initial October 17, 1989, denial of Alpine's agency-level appeal. According to the Forest Service, in evaluating the proposals, the committee miscalculated the fees to be paid to the Forest Service, which could have affected the relative standing of the top two offerors, L&L and Alpine. The Forest Service also determined that L&L's proposals submitted under the 1989 Prospectus were "nonresponsive" because L&L failed to include user fees for all campgrounds; failed to provide the required contingency plan for water supply interruption; and failed to provide an operating plan for a reservations

^{4/} L&L received total scores of 1,419 weighted points on each of its proposals. Alpine received 1,393 points on its Heart Bar proposal and 1,407 points on its Barton Flats proposal. According to the evaluation committee summary report, each offeror submitted virtually identical proposals for the two complexes, resulting in identical scores for the proposals submitted by L&L, and similar scores for the proposals submitted by Alpine.

system. Accordingly, the Forest Service determined not to extend L&L's permit for the 1990 operating season and, rather than award the permits under the 1989 Prospectus, decided to issue the 1990 Prospectus.

Alpine filed a protest in our Office on February 14, challenging the Forest Service's decision not to award the permits to that firm, and objecting to the issuance of the 1990 Prospectus.

JURISDICTION

Initially, the Forest Service argues that the protest should be dismissed as beyond the jurisdiction of our Office because the prospectus results in the issuance of special use permits, and thus does not involve the procurement of goods or services subject to the provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 et seq. (1988). According to the Forest Service, the prospectus merely offers an opportunity to compete for permits which authorize concessionaires to conduct a business activity on federal land. The Forest Service further argues that the administrative appeal procedures set forth at 36 C.F.R. Chapter II, Subpart C (1989), ("Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands"), afford the protester the exclusive forum in which to challenge a Forest Service decision regarding the issuance, denial, or administration of the special use permits.

Under CICA, our bid protest jurisdiction encompasses the procurement of property or services by federal agencies, such as the Forest Service. Fluid Eng'g Assocs., B-234540, May 31, 1989, 89-1 CPD ¶ 520. The permits here are issued under the authority of 16 U.S.C. § 580d (1988), which authorizes the Secretary of Agriculture to require concessionaires to, at their expense, recondition and maintain Forest Service recreation facilities in the offered areas. Accordingly, as a condition to obtaining the permits and in addition to collecting user fees, the 1990 Prospectus requires concessionaires to perform specific tasks designed to protect the land, maintain the campsites, preserve structures in accordance with Forest Service standards and specifications, and enforce Forest Service rules and regulations. The maintenance plan for the Barton Flats Complex, for example, requires concessionaires to replace, paint and straighten barricades, signs, posts, tables, restrooms, etc.; recondition and install fire rings and hydrant posts; maintain and replace trees planted by the Forest Service and associated water systems; and eliminate tree and limb hazards within a specified distance from

campground sites. Thus, while the prospectus ultimately results in permits to use and occupy federal land, the tasks required to be performed as a condition to receiving the permits are intended to benefit the government and to further the functions of the Forest Service.^{5/} But Cf. Crystal Cruises, Inc., B-238347, Feb. 1, 1990, 90-1 CPD ¶ 141, aff'd, B-238347.2, June 14, 1990, 90-1 CPD ¶ — (where we did not exercise jurisdiction because the concession permits simply allowed access into a national park). Under the circumstances here, we conclude that the prospectus at issue is a procurement for services which we will consider under our CICA bid protest authority. TCA Reservations, Inc., B-222575, Aug. 20, 1986, 86-2 CPD ¶ 202.6/

ANALYSIS

Alpine essentially argues that the Forest Service improperly failed to award the special use permits to Alpine pursuant to the 1989 Prospectus after L&L's proposals were determined "nonresponsive," since Alpine is next in line for award under the 1989 prospectus.

The issue before us is not whether Alpine was entitled to award of the permits for the 1989 operating season based on Alpine's original allegations to the agency; in fact, any protest on that ground would be untimely.^{7/} Rather, the

^{5/} See, e.g., 36 C.F.R. § 200.3(b)(2)(ii)(E). One of the functions of the Forest Service is to manage recreation resources on public lands for public enjoyment and benefit.

^{6/} 36 C.F.R. § 251.83(c) specifically provides that decisions under 36 C.F.R. Chapter II, Subpart C, are not subject to the administrative appeals procedures under that subpart where, as here, the jurisdiction of the Comptroller General supersedes that of the Department of Agriculture.

^{7/} Under our Bid Protest Regulations, where a protest is initially filed with the contracting agency, a subsequent protest to our Office must be filed within 10 working days after the protester learns of the initial adverse agency action. 4 C.F.R. § 21.2(a)(3). We regard Alpine's May 12, 1989, "notice of appeal" to the Forest Service as an agency-level protest, and the denial of its appeal dated October 17, as the initial adverse agency action. Accordingly, on February 16, 1990, we dismissed as untimely an initial protest by Alpine, filed in our Office on February 14, more than 10 working days after the initial denial of its appeal. (continued...)

issue is whether, once the Forest Service decided that award of the 1989 permit to L&L was improper, the agency was required to award the permits for the 1990 season pursuant to the terms of the 1989 Prospectus, or whether the agency reasonably decided to resolicit pursuant to the 1990 Prospectus. We see no basis to conclude that the agency was required to award the 1990 or any subsequent season's permit to Alpine, even assuming that Alpine was in line for award under the 1989 Prospectus after the Forest Service decided that L&L's proposals should have been rejected.

The 1989 Prospectus called for issuance of permits for an initial period during the 1989 operating season, with an option to reissue the permits "by mutual consent of both parties" for the 1990 and 1991 seasons. Thus, even accepting Alpine's argument that it, not L&L, was in line for award under the 1989 Prospectus, at most Alpine was entitled to receive only the permits for the 1989 season; no contractor which received permits for the 1989 season had any right to an extension of the permits for subsequent seasons, since in effect they merely were options to be exercised at the discretion of the Forest Service. See Federal Acquisition Regulation § 17.207; Shorthand Reporting, B-236680, Dec. 22, 1989, 89-2 CPD ¶ 584 (agencies are not required to exercise options under any circumstances).^{8/} As a result, there is no basis for us to object

7/(...continued)

After Alpine requested reconsideration of the dismissal, we concluded that the protest was timely only to the extent it challenges the issuance of the 1990 Prospectus.

8/ While it is unfortunate that the administrative appeals process in this case was protracted, this was in part due to the complex nature of the initial notice of appeal on which the Forest Service acted. Alpine's agency-level appeal contained: 1) a request under the Freedom of Information Act, 5 U.S.C. § 552, for L&L's proposals; 2) conflict of interest allegations based on religious affiliation, which the Forest Service initially interpreted as a discrimination complaint requiring review by the Secretary of Agriculture under procedures established pursuant to title VI of the Civil Rights Act of 1964; 3) a request for a stay of the award under 36 C.F.R. § 251.91; and 4) a request for an oral presentation pursuant to 36 C.F.R. § 251.97.

to the Forest Service's decision to issue a new prospectus rather than award permits for the 1990 season pursuant to the 1989 Prospectus.

The protest is denied.

for Robert F. Hinchman
James F. Hinchman
General Counsel